IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

versus

CITY OF ALEXANDRIA,

Appellee.

Appeal from the Supreme Court of the State of Louisiana.

BRIEF FOR APPELLEE.

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OPINION BELOW.

The opinion of the Supreme Court of Louisiana (R. 17 is reported in 217 La. 820, 47 So. (2d) 533.

JURISDICTION.

Jurisdiction is claimed by the appellant on the ground that the ordinance involved violates the Fourteenth Amendment to the *Constitution of the United States*, because it denies to him the right to engage in a lawful private business; that it violates Article I, Section 8, Clause 3 of the *Constitution of the United States* in that it imposes an undue or discriminatory burden upon interstate commerce; that it violates Amendment I and Amendment XIV, Section 1 of the *Constitution of the United States* in that it abridges freedom of speech and of the press.

QUESTION PRESENTED.

Whether Penal Ordinance No. 500 of the City of Alexandria, Louisiana, which regulates solicitors, peddlers and transient vendors violates the *Constitution of the United States* in the respects above set forth.

ORDINANCE INVOLVED.

Penal Ordinance No. 500 of the City of Alexandria, provides as follows:

> "BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALEXANDRIA, LOUISIANA, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana, by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise

and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor."

STATEMENT OF CASE.

The appellant, Jack Breard, was arrested in the City of Alexandria for violating Penal Ordinance No. 500 which prohibits itinerant solicitors and vendors from going upon premises in the residential area for the purpose of soliciting orders or selling goods, wares and merchandise when they have not been requested or invited to do so by the occupant of the dwelling. Before arraignment defendant filed a motion to quash upon five grounds (R. 2). The first two are in narrative form and set forth no legal grounds to support the motion. The basis of the attack is contained in Items 3, 4 and 5 of the motion (R. 3) as follows:

"3. Said ordinance violates the due process clauses of the Constitution of Louisiana (Art. I, Section 2) of the Fourteenth Amendment to the Constitution of the United States because, among other reasons, the ordinance arbitrarily, unreasonably and unduly burdens and curtails and in effect, denies the fundamental right of the defendant and others similarly situated to engage in a lawful private business or occupation.

"4. Said ordinance, as applied to defendant and others similarly situated, imposes an undue or discriminatory burden upon interstate commerce, and in effect is tantamount to a prohibition of such

commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

"5. Said ordinance, as applied to defendant and others similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 to the Constitution of the United States, in that it abridges the freedom of speech or of the press because, among other reasons, it places an arbitrary, unreasonable and undue burden upon the well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method."

The case was tried upon an agreed stipulation of fact, and after considering the law and the evidence the Judge of the City Court overruled the motion of the accused and sentenced him to pay $25.00 and in default of payment of the fine to serve thirty days in the City Jail. Breard appealed to the Supreme Court of Louisiana where the judgment was affirmed (R. 17).

Before discussing the legal questions involved it appears appropriate to call attention as a fact to what the ordinance does not do. It does not prohibit anyone from engaging in a lawful occupation but merely regulates that business for the protection and convenience of the householder. It does not make any discrimination between residents and non-residents but applies equally to those who live in the community as well as to transients. It does not impose any tax on such occupation or levy any

license fee of any kind. It does not preclude those who are engaged in such activities from soliciting on the streets, or in business houses, factories, shops, offices or other places. It does not attempt to regulate the kind of goods, wares or merchandise that may be sold, nor the terms and conditions under which orders may be taken. It does not restrict in any respect the right of salesmen or solicitors to obtain permission to call at private residences. It does not abridge freedom of the press by attempting to restrict in any way what is said or published. It does not prohibit the distribution of pamphlets or circulars containing advertising matter nor does it restrict the distribution of protests against public officials, notices of political or religious meetings, appeals for moral support in any kind of campaign, whether it be political, religious, civic or fraternal.

SUMMARY OF ARGUMENT.

1. The ordinance has been declared valid by State and Federal Courts as against the contention that it violates any rights guaranteed by the *Federal Constitution*. The Supreme Court of the United States has recognized the ordinance by implication as a valid exercise of the municipal police power.

2. Property and property rights are held subject to the fair exercise of the police power and a reasonable regulation for the benefit of public convenience, safety or general welfare is not in violation of the *Federal Constitution*, even though it may have an adverse financial effect on a certain class.

3. The frequent ringing of door bells of private residences by itinerant vendors and solicitors is a nuisance to the occupants of dwellings. It is within the police power of a municipality to protect the rights of privacy in the home against such intrusion by vendors and solicitors who are engaged in commercial activities.

4. It is not the function of the Judiciary to decide whether an ordinance should have been adopted by the governing body of a municipality, or whether an act announced as a nuisance is such *per se*. It is only where there is a clear violation of a right or privilege guaranteed by the *Constitution* that the Courts will interfere.

5. The ordinance under attack covers commercial activities, is not a prohibition, and applies alike to all in the same class. It is not the type of legislation which has been declared unconstitutional because it infringes upon freedom of speech or freedom of the press, or imposes undue burdens on interstate commerce, or violates the due process clause of the *Federal Constitution*.

ARGUMENT.

I.

The Appellate Courts in various states have upheld the validity of an ordinance of this type. In Louisiana the question has been passed upon four times and in each instance the Court has declared that the ordinance does not violate the *State* or *Federal Constitution*. (*Shreveport v. Cunningham*, 190 La. 481, 182 So. 649; *City of Alexandria v. Jones*, 216 La. 923, 45 So. (2d) 79; *Breard v. City of Alexandria* (E. D. La.) 69 Fed. Sup. 722; *City of Alex-*

andria v. Breard, 217 La. 820, 47 So. (2d) 553). In sustaining appellant's conviction in the present suit the Supreme Court of Louisiana said in part (47 So. (2d) 556):

> "A salient feature of this case, which seems to have escaped previous attention, is that, transcendent over the rights which appellant claims are infringed by this ordinance, is a fundamental principle of the law—a man's home is his castle. No one has any vested prerogative to invade another's privacy. Each community knows its own problems best; and if local governments, being as they are closest to the popular will, choose to exercise the sovereign's right to protect a particular class of comparatively defenceless citizens—housewives, we will not intervene to destroy that protection."

The Courts of other states have declared that the type of ordinance involved here is legal. While these decisions are not binding on the Supreme Court of the United States, we believe the views expressed by those Courts will be of interest and we therefore take the liberty of inviting attention to some of them.

In *Ex Parte Hartman*, 76 Pac. (2d) 709 the Supreme Court of California had this to say:

> "We are of the opinion the ordinance is not unconstitutional or void. On the contrary, we think it is a valid exercise of the police power of the city. It does not unlawfully regulate commerce between states nor abridge the privileges of citizens of the United States, nor deny to any person the equal

protection of the law. It applies uniformly to all individuals of the particular designated class of 'canvassers' within or without the City of Sacramento and within or without the State of California. . . ."

In *McCormick v. City of Montrose*, 99 Pac. (2d) 969, the Supreme Court of Colorado held the ordinance to be valid, stating:

"Presumably where a legislative act is passed it represents the sentiment and expresses the judgment of a majority of the citizens within the legislating governmental division or subdivision concerning the proper policy to be pursued with reference to the subject of the legislation. Motives actuating legislators, wisdom or unwisdom of the law and its incidental effects, are not matters with which the judicial branch of the government may properly concern itself if there is power to enact the law.

"A city ordinance prohibiting the solicitation of retail business in private residences without the request or invitation of the householders does not violate the due process clauses of state or federal constitutions, and does not constitute regulation of or interference with interstate commerce within the terms of the Federal Constitution."

In *Town of Green River v. Bunger*, 58 Pac. (2d) 456, the Supreme Court of Wyoming upheld an ordinance similar to the one now under attack. The Court said:

"To sustain the ordinance, we think it unnecessary to decide what the practice which it denounces is

a nuisance. The declaration to that effect shows, however, that the purpose of the ordinance is to prevent disturbance and annoyance, the important elements of nuisance. * * *"

Certiorari was denied by the United States Supreme Court in the above case. (See *Bunger v. Town of Green River*, 300 U. S. 638, 81 L. Ed. 854, rehearing denied, 300 U. S. 686, 81 L. Ed. 889).

In *People v. Bohnke*, 38 N. E. (2d) 418, the Court of Appeals of the State of New York had under consideration an ordinance very similar to the one now under consideration. In affirming the conviction of appellant Bohnke, the Court had this to say:

"The sole defense of the appellants was, and is, the alleged unconstitutionality of the ordinance in that, according to appellants, it is repugnant to the Fourteenth Amendment to the United States Constitution as depriving them of their rights to freedom of religion, freedom of speech, and the equal protection of the laws. . . .

"We hold the ordinance valid. It does not prohibit public pamphleteering. It regulates pamphlet distribution in private, not public, places, and gives no public officer any power of censoring the pamphlets or licensing, or refusing to license, their distribution . . . It does not infringe any of appellant's rights to the free exercise of their religion since it merely regulates their entry onto private property for the purpose of promoting their religious

beliefs. It does leave to the pleasure of the individual householder the determination of whether or not pamphlets may be circulated on that householder's premises, but this infringes no right of appellants, since the Constitution does not guarantee them any right to go freely onto private property for such purposes."

Certiorari was denied by the Supreme Court of the United States in the above case. (See *People v. Bohnke*, 316 U. S. 667, 86 L. Ed. 1743, and a rehearing denied, 316 U. S. 713, 86 L. Ed. 1778).

In *Rowe, et al v. City of Pocatello*, 218 Pac. (2d) 695, the Supreme Court of Idaho had under consideration a similar ordinance. It was contended by appellant that the ordinance was not a nuisance *per se* and that it was therefore beyond the police power of the City to make it a nuisance by ordinance (P. 698). The Court declared that "the power of the City to declare a nuisance is not limited to that which is a nuisance per se. It may also declare that a nuisance which is such in fact or per accidens." The Court cited *District of Columbia v. Brooke*, (214 U.S. 138; 53 L. Ed. 941, 945) and quoted therefrom the language that the police power is "the least limitable of the powers of government." (P. 699). This decision also quotes *Emert v. State of Missouri*, (156 U.S. 297; 39 L. Ed. 430) to the effect that from earliest times, both in England and America, hawking and peddling have been considered a proper subject of police regulation (P. 699); and that the right of a municipality to regulate trades and callings in the exercise of the police power is too well

settled to require any extended discussion (P. 699, citing *Schmidinger v. City of Chicago*, 226 U.S. 578; 57 L. Ed. 364).

The Supreme Court of Idaho quoted with approval the language of the Supreme Court of Wyoming in the *Town of Green River v. Bunger*, (50 Wyo. 52, 58 Pac. (2d) 456), that "the home is a favorite of the law. It is there that the citizen can claim the right of privacy, the right to be let alone on clear grounds" (P. 701). The decision quotes with approval language from *Town of Green River v. Fuller Brush Co.* (C.C.A. 10) 65 Fed. (2d) 112 that "the frequent ringing of door bells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of homes." (P. 701).

Regarding the contention that the ordinance placed an undue burden on interstate commerce the Idaho Court said "as to appellant's contention that the ordinance places an undue burden on interstate commerce the general rule is that if the regulation is within the police power of the state and is a reasonable and not an arbitrary exercise of that power it will not be held repugnant to the commerce clause even though it incidentally or indirectly affects interstate commerce." (Citing *Sligh v. Kirkwood*, 237 U.S. 52, 59 L. Ed. 835; *Wagner v. City of Covington*, 251 U.S. 95, 64 L. Ed. 157, 168; *N. Y. N. H. and H. R. Co. v. State of New York*, 165 U.S. 628, 41 L. Ed. 853 and other cases).

In *Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co.*, 297 N. Y, 339, 79 N. E. (2d) 433, the Court of Appeals of New York cited with approval the language which we have quoted above from *People v.*

Bohnke, to the effect that the ordinance was not repugnant to the *Constitution of the United States* as depriving persons of their rights to freedom of speech and the equal protection of the law. (Certiorari was denied in this case by the United States Supreme Court, 335 U. S. 886, 93 L. Ed. 425, rehearing denied, 335 U. S. 912, 93 L. Ed. 445.

In *Mitchell v. City of Roswell*, 45 N. M. 92, 111 Pac. (2d) 41, the Supreme Court of New Mexico declared in part as follows:

> "All property and property rights are held subject to the fair exercise of the police power; and a reasonable regulation enacted for the benefit of the public health, convenience, safety or general welfare is not an unconstitutional taking of property in violation of the contract clause, the due process clause, or the equal protection clause of the Federal Constitution. Article 1, Sec. 10, Amendment 14. Atlantic Coast Line Railway Co. v. Goldsboro, 232 U.S. 548, 58 L. Ed. 721 * * * the private interests of the individual are subordinated to the superior interests of the public." (Citing *Reinman v. Little Rock*, 237 U.S. 171, 59 L. Ed. 900; *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. Ed. 348; *Barbier v. Conley*, 113 U. S. 27, 28 L. Ed. 923).

The language of Chief Justice O'Neill in *State v. Martin* (199 La. 39, 5 So. (2d) 377) is so appropriate to the present controversy that we take the liberty of quoting (5 So. (2d) 380):

> "These guaranties of freedom of religious worship, and freedom of speech and of the press, do not sanc-

tion trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begins. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, does not conflict with the law which forbids a person to trespass upon the property of another."

II.

In addition to the State Courts which have declared this type of ordinance to be valid we find that the Federal Courts have likewise upheld its validity. As already pointed out in this brief, the Supreme Court of the United States denied certiorari in *Bunger v. Town of Green River* (300 U.S. 638), and in *People v. Bohnke* (316 U.S. 667) and in *Watchtower Bible, Etc. Society v. Metropolitan Life Insurance Company* (335 U.S. 886).

An ordinance of this type was attacked in the Federal Court of Wyoming in the suit of *Fuller Brush Company v. Town of Green River* (60 Fed. (2d) 613). The District Judge held the ordinance to be unconstitutional but on appeal this decision was reversed as appears by opinion in *Town of Green River v. Fuller Brush Company* (65 Fed. (2d) 112) where the Court said:

"We must assume that the practice existed in the town as the first section states, and that it was becoming annoying and disturbing and objection-

able to at least some of the citizens. We think like practices have become so general and common as to be of judicial knowledge, and that the frequent ringing of doorbells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of the homes. It is not appellee and its solicitors and their methods alone that must be considered in determining the reasonableness of the ordinance, but many others as well who seek in the same way to dispose of their wares. One follows another until the ringing doorbells disturb the quiet of the home and become a constant annoyance."

The question was again considered by a Federal Court of Appeal in the suit of *San Francisco Shopping News Co. v. City of South San Francisco*, 69 Fed. (2d) 879, where a similar ordinance was attacked on the ground that it violated the guarantee of freedom of the press. In the course of its opinion the Court said:

"Classification of business for purpose of regulatory legislation under police power is question primarily for legislative body, and Federal Courts are reluctant to declare unconstitutional an enactment of lawmaking body of State or any of its agencies or subdivisions."

While the precise question has not been presented directly to the Supreme Court of the United States, the type of ordinance involved here has in effect been declared legal insofar as commercial activities are concerned. We

quote the following from the syllabus of *Thelma Martin v. City of Struthers*, 319 U.S. 141, 87 L. Ed. 1313:

> "An ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the inmates of any residence to the door for the purpose of receiving such literature, is, as applied to one knocking on doors and ringing doorbells in order to distribute to the inmates of homes leaflets advertising a religious meeting, an unconstitutional invasion of the right of freedom of speech and press, since the ordinance, by failing to distinguish between householders who are willing to receive the literature and those who are not, is extended farther than is necessary for the protection of the community."

In delivering the opinion of the Court, Justice Black in a footnote, which we consider to be part of the opinion, says this with reference to the ordinance:

> "This ordinance was not directed solely at commercial advertising. CF. Valentine v. Christensen, 316 U.S. 52, 86 L. Ed. 1262, 62 S. Ct. 920; Green River v. Fuller Brush Co. (CCA 10th) 65 F. (2d) 112, 88 ALR 177."

In *Schneider v. Town of Irvington*, 308 U.S. 146; 84 L. Ed. 155, headnote 8 reads as follows:

> "A municipal ordinance which prohibits canvassing, soliciting, the distribution of circulars or other matter, or calling from house to house, without having first obtained a police permit, * * * which may be refused on the ground that the applicant is not of

good character * * *, the effect of which is to make canvassing from door to door subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it, unconstitutionally abridges freedom of speech and of the press secured against state invasion by the Fourteenth Amendment when applied to *noncommercial* canvassing by one who distributes booklets published by a religious organization and requests contributions for the purpose of printing booklets to be placed in the hands of others." (Emphasis ours).

III.

It is not a sound argument to say that appellant will be adversely affected in a financial way by the ordinance. There is nothing in the record to show this, but assuming it to be true nevertheless the Courts have held that property rights are subject to the fair exercise of the police power.

In *San Francisco Shopping News Co. v. City of San Francisco* (C.C.A. 9) 69 Fed. (2d) 879, the decision points out that Courts are not concerned with the motives or purposes of a Legislative body in adopting ordinance and that Federal Courts are reluctant to declare unconstitutional any measure passed by the law making body of the State or any of its subdivisions. The decision among other things declared that (P. 890) "the appellant has repeatedly stressed that, if the ordinance is enforced it will ruin and destroy its business in South San Francisco. While we cannot share the appellant's pessimism in this regard and

cannot concur in its dire predictions of ruin and destruction, even if its predictions were correct the application of the doctrines to which we are here adhering could not be averted." (Citing *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48, 65 L. Ed. 489).

The ringing of door bells by canvassers and transient vendors is a nuisance and invades the right of privacy of the home.

This phase of the argument has been touched upon already in the preceding pages of this brief and we will not repeat what has been said there except to say in a general way that the law has always regarded the privacy of the home as something to be zealously guarded and that the frequent ringing of doorbells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of the homes. (See *Rowe v. City of Pocatello* (Idaho), 218 Pac. (2d) 695; *Emert v. State of Missouri*, 156 U.S. 297; 39 L. Ed. 430; *Town of Green River v. Bunger*, 50 Wyoming 52, 58 Pac. (2d) 456; *Town of Green River v. Fuller Brush Co.* (C.C.A. 10) 65 Fed. (2d) 112).

It is generally recognized that the Courts will not set aside the legislative enactments of a State or a municipality unless there has been a clear violation of a constitutional right.

In the very recent case of *American Communications Association v. Douds*, 339 U.S. 382, 94 L. Ed. 925,

the Supreme Court of the United States, in discussing an alleged infringment of a *Constitutional* right said:

> "On the contrary, however, the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades privacy of the home and may drown out others who wish to be heard. Kovacs v. Cooper, 336 US 77, 93 L. Ed. 513, 69 S. Ct. 448, 10 ALR (2d) 608 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. Cox v. New Hampshire, 312 US 569, 574, 85 L. Ed. 1049, 1052, 61 S. Ct. 762, 133 ALR 1396 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, Prince v. Massachusetts, 321 US 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), or of the whole community, Jacobson v. Massachusetts, 197 US 11, 49 L. Ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765 (1904), and it may be offensive to the moral standards of the community. Reynolds v. United States, 98 US 145, 25 L. Ed. 244 (1878); Davis v. Beason, 133 US 333, 33 L. Ed. 637, 10 S. Ct. 299 (1890)."

As a general rule the wisdom of legislative enactments is not to be questioned unless the result is unreasonable and arbitrary or capricious in its application. If

there is a logical connection between the means used and those to be accomplished the Courts will not interfere. (*Ry. Express Agency v. N. Y.*, 336 U.S. 106, 93 L. Ed. 533; *McCormick v. City of Montrose*, 99 Pac. (2d) 969; *Green v. Town of Gallup*, 46 N. W. 71, 120 Pac. (2d) 619). In *San Francisco Shopping News Co. v. City of South San Francisco*, 69 Fed. (2d) 879, we quote the following excerpts from the headnote:

> "Courts are not concerned with motives or purposes of legislative body in enacting statutes, save as they appear in legislation itself, provided enactments are within the scope of legislative power.
>
> "In determining whether certain businesses, or manner in which they are conducted, are vicious, harmful, useful or non-useful as basis for regulatory legislation, court will permit latitude to municipal legislative body based on local condition.
>
> "Classification of business for purpose of regulatory legislation under police power is question primarily for legislative body, and Federal Courts are reluctant to declare unconstitutional an enactment of law-making body of State or any of its agencies or subdivisions."

The Supreme Court of the United States has consistently held that it is not the function of the judiciary to determine whether an ordinance is proper or wise, this being a matter for the legislative bodies to determine. In *Railway Express Agency v. New York*, (336 U.S. 106, 93 L. Ed. 533), the Court says (Page 109): "We do not sit to weigh evidence on the due process issue in order to deter-

mine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See Olsen v. Nebraska, 313 U.S. 236, 85 L. Ed. 1305." (See also *Nebbia v. State of New York*, 291 U.S. 502, 78 L. Ed. 940; *Murphy v. California*, 225 U.S. 623, 56 L. Ed. 1229; *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348; *Barbier v. Connelly*, 113 U.S. 27, 28 L. Ed. 923).

ANSWER TO APPELLANT'S ARGUMENT.

We propose to show that appellant's contentions find no substantial support in the authorities upon which he relies, even though the law cited may be good as to the particular situations involved in those cases.

A.

THE ORDINANCE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

Appellant contends that the ordinance arbitrarily and unduly denies him the fundamental right to engage in a lawful private business or occupation and cites in support thereof *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940; *Adams v. Tanner*, 244 U.S. 590, 61 L. Ed. 1336; *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. Ed. 832; *Murphy v. California*, 225 U.S. 623, 56 L. Ed. 1229.

The *Nebbia* case dealt with an act of the Legislature of New York establishing a Milk Control Board with power to fix minimum and maximum retail prices to be charged for milk. Nebbia violated the Board's order and was convicted. He contended that the statute was against

the equal protection clause and the due process clause of the Fourteenth Amendment. When the case reached the Supreme Court of the United States the issue was stated thus in the opinion: "The question for decision is whether the *Federal Constitution* prohibits a state from so fixing the selling price of milk." (P. 515) A lengthy discussion of the particular issue then follows and it is not in any way similar to the one now before the Court. The conviction was affirmed and Justice Roberts who delivered the majority opinion made many comments all of which we construe to be against the appellant here. For example:

> "These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property." (P. 524).

> "The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power. The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest." (P. 525).

Adams v. Tanner involved the legality of a law, known as the Employment Agency Law, which made it a criminal offense for any employment agent to receive directly or indirectly from a person seeking employment any fee whatever for furnishing him with employment. As stated in Headnote 2 "Prohibition, not regulation is what is accomplished by the provisions of the Washington Employment Agency Law." The statute made it a crime for anyone to engage in a business which was legitimate, said the Court. It could not be denied stated the Court that the business of an employment agent is a legitimate business, as much so as that of a banker, broker or merchant; that the business in which the defendant was engaged was not only innocent but was highly beneficial as tending the more quickly to secure labor for the unemployed (P. 593). There is no similarity between the *Adams* case and the present one.

Allgeyer v. State of Louisiana dealt with an Act of the Legislature of Louisiana which prevented the owner of cotton in that state from sending to an insurance company of another state an order by mail for insurance on the cotton if the insurance company had not been authorized to do business in Louisiana. The Supreme Court of the United States said that the facts showed that the policy of Louisiana was to forbid insurance companies which had not complied with the laws of the State from doing business within its limits but that this policy "cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with refer-

ence to a company which is not doing business within its limits." (P. 593).

Murphy v. California involved the validity of a municipal ordinance which prohibited the keeping of billiard or pool tables for hire for public use, but permitted hotel keepers to maintain a billiard or pool room in which their regular guests might play. Appellant appealed from a conviction for violating the ordinance and the Supreme Court of the United States affirmed the decision of the lower Court. We fail to see what consolation appellant finds in the *Murphy* case. On the contrary it lends support to appellee herein. The Supreme Court of the United States made the following comment in the *Murphy* case:

> "The 14th Amendment protects the citizen in his right to engage in any lawful business but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public." (P. 628).

In addition to citing the *Nebbia*, *Adams*, *Allgeyer* and *Murphy* cases appellant here has contended that the Courts which have sustained the ordinance have failed to distinguish between a public and a private nuisance and have overlooked the fact that house to house solicitation, is not in fact a nuisance, but if it were it would only be a private nuisance for which the perpetrator could not be criminally prosecuted. No authority is given in support of this statement and it might well be ignored. To the contrary the Courts have held that a certain line of conduct may be declared a nuisance by municipal ordinance.

Further the Courts have stated that house to house solicitation is in fact a nuisance, as shown by the decisions which we have heretofore cited in this brief.

Whether an ordinance is a nuisance *per se* is immaterial. In *Reinman v. Little Rock*, (237 U.S. 171, 59 L. Ed. 900), the validity of an ordinance regulating livery stables was at issue. The Court said (Page 176):

> "Granting that it is not a nuisance per se it is clearly within the police power of the state to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law provided this power is not exerted arbitrarily or with unjust discrimination so as to infringe upon rights guaranteed by the Fourteenth Amendment."

Another contention made by appellant is that the Courts which have sustained the type of ordinance involved here overlooked the fact that many householders do not disapprove of solicitation, and that householders who do disapprove of house to house solicitation can readily avoid same by posting their premises with "No Soliciting" signs. May we respectfully suggest that this argument is based entirely upon assumption insofar as the citizens of the City of Alexandria are concerned. As already stated in this brief ordinances of this type are presumed to have been adopted in response to public sentiment in the community. Certainly local authorities would have no reason to pass an ordinance against the wishes and desires of their people. If, however, the erection of signs on residences is to be con-

sidered as a solution of the problem. why not hold that householders who desire to be solicited or who have no objection to invasion of their homes should post signs reading "Solicitors Welcome." Isn't one argument as logical as the other? In addition the Court will surely realize that the putting of signs on residential property in a conspicuous place is highly objectionable to many householders. Why should they be required to deface their property by conspicuous signs in order to keep out peddlers?

B.

THE ORDINANCE DOES NOT VIOLATE THE COMMERCE CLAUSE.

Appellant contends that beginning with a long line of decisions from *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 30 L. Ed. 684 and culminating in *Nippert v. City of Richmond*, 327 U.S. 416, 90 L. Ed. 760, the United States Supreme Court has consistently protected the solicitor or drummer from state or municipal taxation or license fees or bonding requirements.

Appellant then endeavors to stretch the holding in those cases to cover the ordinance now under consideration. Inasmuch as the Alexandria ordinance does not pretend to impose any municipal tax or license fee, or any other requirement as to a bond or permit, the argument that the measure imposes an undue or discriminatory burden upon interstate commerce is without foundation. The *Robbins* case declared invalid a state law which required drummers to pay a license fee for doing business and it was held that this was a tax on interstate commerce. There then fol-

lowed in 1925 the case of *Real Silk Hosiery Mills v. City of Portland*, 236 U.S. 235, 69 L. Ed. 982, on the question of the payment of a license fee and the filing of a bond by solicitors who took orders for future delivery of goods.

An enlightened interpretation of the commerce clause was evidenced in the cases of *McGoldrick v. Berwind-White Coal Mining Company*, (309 U.S. 33, 84 L. Ed. 565), and *McGoldrick v. Felt and Tarrant Manufacturing Company*, (309 U.S. 70, 84 L. Ed. 584), which are sometimes referred to as the New York Sales Tax cases. The New York City tax law placed a sales tax of two percent upon the amount of the receipts from every sale in the city. It provided that the tax should be paid by the purchaser to the vendor for and on account of the City of New York, but made the vendor liable as an insurer of its payments to the City. In each instance the tax levy was upheld. The opinion of Mr. Justice Stone in the *Berwind-White Coal Mining Company* case is a learned and exhaustive review of the history and purpose of the commerce clause of the *Federal Constitution.*

One of the late cases relied on by appellant is that of *Nippert v. City of Richmond*, (327 U.S. 416, 70 L. Ed. 760). Appellant was convicted of soliciting without obtaining the required license and paying the required fee. The appellant relied on the *Robbins*, and *Real Silk Hosiery* cases known as the "drummer" cases. The City of Richmond argued that the tax was not discriminatory or unduly burdensome in effect and relied upon the *McGoldrick* cases. The Supreme Court of the United States held among other things that the solicitation in the *Nippert*

case was casual and irregular and did not constitute a course of doing business in the City of Richmond. The amount of tax or license to be paid by the solicitor was $50.00 plus a certain percentage of the gross receipts for the preceding year. The Court discussed the amount of the tax or fee and distinguished the *Nippert* case from the New York sales tax cases. The Court explained that the fee or tax imposed by the City of Richmond on the small operator and more especially the casual one from out of the state would be not only burdensome but prohibitive with the result that commerce would be stopped before it was begun. The *Nippert* case deals with taxing interstate commerce.

In his argument before the Supreme Court of Louisiana in connection with the interstate commerce feature appellant stated that "provincial interests and local political power are at their maximum weight in bringing about this type of legislation in order to protect local business interests from interstate commerce competition." We merely wish to say that there is no foundation whatever in the record for any such argument. It is unsupported by any proof. There is no evidence that the ordinance under attack was adopted at the request of local business interests. We know that it was not, but that it was adopted because of the complaint of housewives in the City of Alexandria who had been disturbed and interrupted at inconvenient hours and under embarrassing conditions.

Again in the Supreme Court of Louisiana appellant argued that any attempt to procure the prior consent required by the ordinance would require the extensive use

of the mail or telephone, or both, and itinerant solicitors would have to remain for a much longer period of time in each city or town. Here again the argument is not based upon any proof in the record. As a practical matter we disagree with the contention advanced by appellant on this point. Experience has proven that many transient solicitors have operated successfully under the ordinance by first obtaining permission from the householder to make a visit. Much time is saved in this way; the parties contacted have shown an interest in the proposition; there is none of the unpleasantness which results from a surprise call. But even if appellant's argument in this respect were correct nevertheless this does not afford the Court any ground for declaring the ordinance invalid, as already pointed out in this brief.

One of the cases relied on by appellant is *Best and Company v. Maxwell*, (311 U.S. 454, 85 L. Ed. 275). The Court there held that a statute which levied a privilege tax of $250.00 on every person or corporation not a regular retail merchant in the state who displayed samples in any room occupied for the purpose of securing retail orders discriminated against interstate commerce because the only tax to which regular retail merchants in the state were required to pay amounted to $1.00 per annum even though they engaged in the sale of goods elsewhere than in their own display room. The *Best* case is not applicable here because there was a tax involved and the facts showed that there was gross discrimination against those engaged in interstate commerce.

C.

THE ORDINANCE IS NOT AN ABRIDGMENT OF FREEDOM OF SPEECH AND OF THE PRESS.

The argument is advanced by appellant that freedom of the press is not limited to censorship of publication, but extends equally to distribution and circulation. The ordinance involved does not pretend to censor in any manner the periodicals or literature to be sold, or attempt in any way to regulate the terms and conditions under which they are sold. Appellant's argument apparently is that since it might be more inconvenient and expensive to obtain the permission of the householder before making solicitations on the premises and since the profits of itinerant salesmen would not be as great under the ordinance as they would be if allowed a free hand in their visitations into dwellings, therefore there has been an interference with distribution and circulation which is repugnant to the guarantee of freedom of the press.

We wish to briefly analyze some of the cases cited by appellant on this point. One of these is *Lovell v. City of Griffin*, (303 U.S. 444, 82 L. Ed. 949). That ordinance prohibited the distribution of circulars, handbooks, advertising or literature "whether said articles are being delivered free or whether same are being sold" without first obtaining written permission from the City Manager. The appellant in that case was distributing religious tracts. The Supreme Court of the United States in setting aside the ordinance had this to say:

> "The ordinance prohibits the distribution of literature of any kind at any time at any place and in

any manner without a permit from the City Manager * * *

"Legislation of the type of ordinance in question would restore the system of license and censorship in its baldest form." (Pages 451 and 452).

Certainly the issues in the *Lovell* case are not similar to those here. The opinion there states that "whatever the motive which induced its adoption its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." (Page 451).

Another case relied on by appellant is *Winters v. New York*, (333 U.S. 507, 92 L. Ed. 840). This involved the validity of a New York statute which made it an offense to publish or distribute publications made up principally of criminal news, police reports or accounts of criminal deeds or of blood shed, lust or crime. The Court held in effect that the statute was so vague as to make criminal an innocent act and that a conviction under it could not be sustained. We fail to see anything in the *Winters* case from which appellant may find support. As we understand the decision the case was decided on the point that the statute might result in the conviction of an innocent person because as the Court said "it does not seem to us that an honest distributor of publications could know when he might be held to ignore such a prohibition."

Another case relied upon by appellant is *Ex Parte Jackson*, (96 U.S. 727, 24 L. Ed. 877). The question involved was the right of petitioner to a writ of habeas

corpus on the ground that he had been illegally convicted for sending improper material through the mail. Reference is made to regulations which attempt to interfere with the freedom of the press and the Court declared that no such regulations could be enforced against the transportation of printed matter in the mail so as to interfere in any manner with the freedom of the press.

Another case relied upon by appellant is *Grosjean v. American Press Co.*, (297 U.S. 233, 80 L. Ed. 660). The facts in that case were that the State Administration then in power was being criticized by the publishers of nine newspapers in Louisiana. The Legislature passed a law levying a license tax on them of two percent of the gross revenues of their business. It was evident that the newspapers were being punished because of their comments on public affairs and the statute definitely was an attempt to punish or restrict them. The freedom of the press was discussed in the decision but the basis of the decree is found in these words of the opinion: —

> "It (the tax) is bad because in the light of its history and of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the Constitutional guaranties * * *. The form in which the tax is imposed is in itself suspicious * * *. It is measured alone by the extent of the circulation of the publications in which the advertisements are carried with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." (Page 669).

Another case cited by appellant is *Thomas v. Collins*, (323 U.S. 516, 89 L. Ed. 430). This involved a habeas corpus proceeding against a sheriff in Texas who had arrested the appellant for soliciting membership in specified labor unions. There is nothing in the case which is applicable here. The Court declared that to require a person to register in order to make a public speech would seem generally incompatible with the right of free speech and free assembly. The Court said further that peaceable assembly for lawful discussion cannot be made a crime under the *Federal Constitution*.

Appellant cites *Martin v. City of Struthers*, (319 U.S. 141, 87 L. Ed. 1313). There appellant was a member of Jehovah's Witnesses and went from house to house knocking on doors and ringing door bells in order to distribute leaflets advertising a religious meeting. Appellant was arrested for violating an ordinance which made it unlawful to distribute handbills, circulars or other advertisements by ringing the doorbell, sounding the door knocker or otherwise summoning the inmate of the residence to the door. The Court said that freedom to distribute information to every citizen wherever he desires to receive it is necessary for preservation of a free society. We call special attention to the fact that the opinion contains this comment in a footnote: "This ordinance was not directed solely at commercial advertising. Valentine v. Christensen, 316 U.S. 52, 86 L. Ed. 1262; Green River v. Fuller Brush Co., (CAA 10) 65 Fed. (2d) 112." We conclude from the footnote quoted that the *Martin* case is against appellant as it indicates that the Court would have decided dif-

ferently if the activities of the appellant had been of a commercial nature.

In *Schneider v. Irvington*, (308 U.S. 147, 84 L. Ed. 155) where the validity of an ordinance was under consideration which prohibited anyone from soliciting or distributing circulars or calling from house to house for this purpose without first receiving a written permit from the Chief of Police the Supreme Court of the United States set aside appellant's conviction on the ground that the ordinance permitted canvassing subject only to the power of a police officer to determine as a censor what literature might be distributed from house to house and who might distribute it. The Court pointed out that the ordinance was not limited to those who canvassed for private profit, and said that it was improper for a municipality to require those who wished to disseminate ideas to present them first to police authorities for their consideration and approval. But the Supreme Court then said this: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." (Page 166) Here again we have by implication the approval by this Court of an ordinance which regulates commercial activities.

The case of *Near v. Minnesota*, (283 U.S. 697, 75 L. Ed. 1357) which is relied on by appellant dealt with a law of the State of Minnesota which provided for the abatement as a public nuisance of a malicious scandal and defamatory newspaper, magazine or other periodical. As pointed out in the decision the statute was directed not simply at the circulation of certain kinds of publications

but also suppression of the offending newspaper or periodical and further "to put the publisher under an effective censorship" (Page 712). The Court after discussing the details of procedure outlined in the statute declared that the statute required the owner or publisher to bring competent evidence to satisfy the Judge that the publication was with good motives and for justifiable ends otherwise the newspaper or periodical would be suppressed and the Court added "this is of the essence of censorship." (Page 713) But the Court went further and said with reference to liberty of the press as historically conceived and guaranteed that "in determining the extent of the constitutional protection it has been generally, if not universally considered that it is the chief purpose of the guarantee to prevent previous restraints upon publication." There follows a discussion of the struggle in England with a quotation from *Blackstone* to the effect that every free man has the right to lay what sentiments he pleases before the public, and that to forbid this is to destroy the freedom of the press.

In *Cox v. New Hampshire*, (312 U.S. 569, 85 L. Ed. 1049), the appellant was convicted of violating an ordinance prohibiting a procession upon a public street without a special license. The appellants raised the question that the statute was invalid under the *Constitution of the United States* in that it deprived them of their rights of freedom of worship, freedom of speech and press and freedom of assembly. The Court refused to set aside the conviction.

In *Hood v. DuMond*, (336 U.S. 525, 93 L. Ed. 865), the question concerned the power of the state of New York

to deny additional facilities to acquire and ship milk in interstate commerce, it being charged that the burden upon interstate commerce would protect local and economic interests. There is a full discussion of the meaning of the commerce clause in the *Constitution* but the facts in that case are not similar in any respect to those in the case at bar.

In *Valentine v. Christensen*, (316 U.S. 52, 86 L. Ed. 1262) the right of a person to distribute handbills on the streets of New York containing commercial advertising was involved. The issue as stated by the Supreme Court of the United States was whether the ordinance prohibiting such activity was an unconstitutional abridgment of freedom of the press and of speech. The Court declared that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion which municipalities could not unduly burden or proscribe. But the Court added: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." (Page 54).

The rulings and comments of this Court in various cases we have cited in this brief show the principle that has been recognized heretofore in matters of this kind, namely, that restrictions imposed by municipal authorities under the police power with respect to the circulation and distribution of pamphlets, periodicals and other literature are not repugnant to the *Constitution* where commercial activities are concerned. The language quoted from the *Valentine* case in the above paragraph is clear on this point. In the *Schneider* case, (308 U.S. 166) this Court

said that there was no intention of holding "that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires". In the *Martin* case (319 U.S. 141) the Court makes the distinction between commercial advertising and the distribution of leaflets advertising a religious meeting, and by implication the Court in a footnote affirms the decision in the *Valentine* case as well as that in *Town of Green River v. Fuller Brush Company* (65 Fed. 112, C.C.A. 10). The refusal of certiorari by the United States Supreme Court in *Bunger v. Town of Green River* (300 U.S. 638) and in *People v. Bohnke* (315 U.S. 667) and in the *Watchtower Bible and Society* case (335 U.S. 886), all of which dealt with this type of ordinance is at least an implication that this Court has not considered the type of ordinance involved here to violate any rights guaranteed by the *Constitution.*

CONCLUSION.

In our statement of the case we mentioned that Penal Ordinance No. 500 of the City of Alexandria is not discriminatory. It bears alike upon the residents of the State of Louisiana and transients. It imposes no tax or license. It does not prohibit salesmen from going on residential property and soliciting sales. It merely attempts to protect the privacy of the home and to assure the occupant of the dwelling that he will not be disturbed and called to the door to answer a summons from an itinerant salesman. Regardless of the care with which he has been selected by his employer, the fact remains that the disturbance to the householder is just as great whether the intruder is polite or disrespectful. As stated by Judge Porterie in *Breard*

v. City of Alexandria, (69 Fed. Sup. 722), where this same appellant attempted to enjoin the enforcement of this same ordinance, the Court said:

> "Surely, we grant that plaintiff's solicitors have not been proved of objectionable character, and for the decision of the case let us admit them as irreproachable Chesterfields, but this law is to make for the peace of all householders from solicitors of all grades and classes."

The situation was well stated in *Rocky Mountain Law Review*, Vol. 6, Page 85, from which we quote the following:

> "The dogged, tenacious and sometimes pugnacious determination with which salesmen have literally flung themselves through residential portals and at householders, the transient nature of their principal places of business, their financial irresponsibility in many instances, and an early and very general tendency to defraud the unwary must have borne considerable weight upon the minds of those who have been instrumental in putting such regulatory legislation upon statute and ordinance books of our states and municipalities."

While the Supreme Court of the United States has declared that it is a common practice for persons to go from home to home to communicate ideas or to invite the occupants to political, religious or other kinds of public meetings *(Martin v. City of Struthers)* and while the Court has held that freedom to distribute information to

every citizen, where he desires to receive it, is vital to the preservation of a free society, this does not mean that salesmen have a constitutional right to invade the privacy of the home, summon the occupant to the door and subject him to high powered salesmanship. There is, in each case, whether the sale be made by sample or immediate delivery, the same intrusion into the domicile, the same relentless pursuit of a purchaser, the same practised and persistent salesman adroitly pressing his wares on the attention of those who neither need nor wish for them but who are unable to resist the wiles or penetrate the deceptions practised upon them.

It is true that pamphlets and periodicals have been described by this Court as historic weapons in the defense of liberty as the history of Thomas Paine and others abundantly attest (*Lovell v. Griffin*, 303 U.S. 444, 82 L. Ed. 949). Where an ordinance attempts to prevent the circulation of pamphlets or other periodicals which are intended to communicate ideas or to invite people to public meetings or call the attention of the public to matters affecting their rights, liberty and welfare, it would be wrong to restrict such activity. We can all agree that it is imperative to preserve a free society and to uphold the traditions of this country which permit full freedom of speech, of religion and of the press and that the legitimate dissemination of ideas on political, social and economic questions should not be curtailed. But to safeguard these rights it is necessary to give judicial sanction to the invasion of

the home? No patriotic person wants to deny to any citizen the freedoms guaranteed by the *Bill of Rights* or deprive him of any of the guarantees of liberty contained in the *Federal Constitution.* But to safeguard these is it necessary to permit the abuses, the disturbances, the inconveniences and unpleasantness that accompany house to house solicitation for commercial purposes?

An ordinance presumably represents the wishes of local citizens and expresses the judgment of the municipal legislative body. The motives which actuate legislators, the wisdom of their enactments and the incidental effects of their legislation are generally matters with which the judicial branch of the government may not properly concern itself. A measure of the kind now before the Court does not prohibit house visits except by those who are seeking to sell something. The ordinance regulates their activities so that the home may be a sanctuary from intrusion and "a refuge from the pulling and hauling of the market place and the street." As said by the Supreme Court of the United States on one occasion: "This Court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the Courts are primarily the judges of the necessities of local situations calling for such legislation and the Courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred." (*Schmidinger v. Chicago*, 226 U. S. 578, 57 L. Ed. 364).

For the reasons stated above appellee respectfully prays that the judgment of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

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